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ENVIRONMENTAL DEGRADATION AS A THREAT TO LIFE: A QUESTION OF JUSTICE?

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In today's society, environmental degradation is one of the root causes of the threat to human life. However, the question of environmental protection is often viewed as a political and scientific one so a large part of environmental protection is not a matter of law and justice. Nonetheless, besides this political question there is the question of fundamental rights. The United Nations Special Rapporteur for the Sub-Commission on Prevention of discrimination and Protection of Minorities, Fatima Ksentini, in her final report on human rights and the environment recognized the reciprocal relationship between human rights and the environment.[1] There is a need to take into consideration environmental issues and their consequences on human life as "environmental damage affects enjoyment of human rights and that human rights affects environmental conditions, and that protection of each requires protection of the other as well".[2] The protection of the environment may bear on many human rights, but it most directly affects the rights that protect the integrity of persons and their immediate surroundings. Some environmental harm must be considered as a violation of fundamental rights, and because traditional international law is restricted to sovereign states human rights protection must be the complementary alternative for peoples suffering environmental destruction. Therefore, in some cases through ecosystem disruption and destruction, deforestation, desertification, contaminations of the environment (air, water, soils and biota) human life is threatened and human rights protection is needed as it is usually the less protected peoples in terms of legal protection who are threatened. As highlighted by Popović: "When the

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[1] U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Review of Further Developments in the Fields Which the Sub-Commission Has Been Concerned, Human Rights and the Environment: Final Report Prepared by Ms. Fatma Zohra Ksentini, Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1994/9 Final Report.

[2] Popović, "In pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment" (1996) 27 *Columbia Human Rights Law Review* 387, at 391.

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HeinOnline -- 6 Trinity C.L. Rev. 81 2003

environment suffers, people suffer; when the suffering implicates human rights, relevant norms and procedures should apply".[3] The choice to focus on the link between life and threat to the environment is based on the idea that life is the most important purpose of human rights protection. As captured by Ramcharan:

> There can be no issue of more pressing concern to international law than to protect the life of every human being from unwarranted deprivation. If international law is unable to fulfil this basic task then for what does it exist?[4]

Human rights law has evolved considerably over the past half-century. Most of this evolution has occurred at the international level. In recent years the creation of mechanisms to promote accountability has become a focal point of activity for international lawyers. As a very important aspect of the international protection of life is the trial of persons guilty of gross violations of the right to life, in this regard it would be relevant to study whether the development of international criminal law could allow for the punishment of those persons. The idea of such a study is based on a simple reading of the everyday news, as at least once a week there is a threat to the environment that may lead to a threat to human life. Human life and environmental quality which permits life are interlinked, thus when human rights pretend to protect life there is a need to recognised this deep and basic relationship between human and their environment.

Therefore, the purpose of this paper is to appreciate if international human rights law is able to protect life when the threat is based on the destruction of the natural environment. The first issue is to appreciate whether international human rights law has an approach to the right to life that is broad enough to protect individuals against threats to their lives through environmental destruction. The second issue is linked with the fact that environmental damage may threaten a person or a group of person. In several cases the destruction of the natural environment has put in jeopardy the survival of a group or people. Thus, it is important to appreciate if through the prohibition of crimes against humanity and crimes of genocide, international criminal law offers 'justiciability' to the victims of such crimes that are threatening peoples through the destruction of their environment. Thus this paper seeks to explore the possible link by which the future International Criminal Court might be the path to protect individuals whose life has been abused through environmental destruction,

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[3] *Ibid.*, at 389.

[4] Ramcharan, *The Right To Life in International Law* (Martinus Nijhoff, 1985), at 8.

HeinOnline -- 6 Trinity C.L. Rev. 82 2003

in this regard notions of 'ecocide' and 'environmental' crime against humanity will be explored.

The Protection of the Right to Life

The right to life could be interpreted as a narrow or a broad obligation. The issue is to define to what extend human rights law can include the protection of the human environment under the protection of the right to life, and what kind of state duty existed under international human rights law for such a protection. The right to life is certainly the most fundamental right as "the enjoyment of the right to life is a necessary condition of the enjoyment of all other human rights."[5] The protection of the environment must be considered as a vital aspect of the right to life as without a sound environment it would be not possible to sustain an acceptable quality of life or even life itself. In 1972, the United Nations Conference on the Human Environment in Stockholm in its principle 1, stated: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that's permits a life of dignity and well being". By the same token, in 1992, Principle 1 of the Rio Declaration stated: "[Human beings] are entitled to a healthy and productive life in harmony with nature".[6] Environmental degradation may affect the enjoyment of life without threatening it directly but rather infringing upon the quality and condition of life.

Therefore, the question is: "To what extent does the right to life contain a component with regard to the satisfaction of requirements necessary for sustaining life, e.g. food, water and health protection?"[7] Then, the issue is to define whether the right to life contains the obligation to prevent situations that might imperil human life through the destruction of the environment. The right to life as provided in Article 6 of the International Covenant on Civil and Political Rights (ICCPR), Article 2 of the European Convention of Human Rights, Article 4 of the American Convention on Human Rights and Article 4 of the African Charter on

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[5] Przetacznick, "The Right to Life as a Basic Human Right" (1976) 9 *Revue des Droits de l'Homme/Human Rights Journal*, 589, 603. *See* also General Comments of the Human rights Committee No. 6, U.N. Doc. CCPR/C/21/rev.1.

[6] "Principles on Generals Rights and Obligations: Draft Principles Proposed by the Chairman, Rio Declaration on the Environment and Development", UN Doc. A/CONF/151/PC/WG.III/L.33/Rev.1 (1992).

[7] Ramcharan, *op. cit.*

HeinOnline -- 6 Trinity C.L. Rev. 83 2003

Human and Peoples' Rights[8] prohibit states from taking life intentionally or negligently. However, it is unclear to what extent this right also involves a "positive action on the State to take steps that would prevent a reduction in, or promote life expectancy". [9] Nevertheless, the Human Rights Committee (HRC) in its General Comments has noted that the right to life has been too often narrowly interpreted:

> The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positives measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.[10]

An acknowledgement of such an affirmative obligation would have far-reaching consequences for environmental protection. It is clear that this negative obligation is accompanied by the positive obligation to take all appropriate measures to protect and preserve human life.[11] The issue is to appreciate whether such positive obligation extends to the protection of life against acts that result in environmental pollution. As highlighted by Ramcharan, the fundamental character of the right to life renders inadequate narrow interpretations as to its ambit in the context of modern human rights jurisprudential thinking. The right to life, in its modern proper sense is not only a protection against any arbitrary deprivation of life, but furthermore states are under the duty "to take all possible measures to prevent violations of the right to life by others; to take all the possible measures to safeguard the environment"[12]. Therefore states are under an obligation to avoid serious environmental hazards that might put life in jeopardy. In this regards, human rights jurisdictions have used a dynamic

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[8] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), UN Doc. A/6316 (19966), 993 UNTS 3; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, (ETS No. 5), 213 UNTS 222; *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 UNTS 123; *African Charter on Human and Peoples' Rights*, adopted June 27, 1981, OUA Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

[9] Boyle and Anderson, *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1996), at 90.

[10] Human Rights Committee, "General Comments" UN Doc. CCPR/C/21/Rev.1, at 5.

[11] *See*, for example *Association X v. United Kingdom* No. 7154/75, 1981, where the European Court of Human Rights stated that the right to life defined under the Convention enjoins the state to take appropriate step to safeguard life.

[12] Ramcharan, *op. cit.*, at 17.

HeinOnline -- 6 Trinity C.L. Rev. 84 2003

interpretation of the right to life as human rights treaties are 'living instrument' and then embody 'evolutionary' concepts.

Human rights courts or commissions have confirmed the notion of state duty to protect the right to life by protecting the quality of life that renders it worth living. For example, the Inter-American Commission on Human Rights (IACHR) has recognized the link between environmental degradation and violation of the right to life. This case followed a petition submitted on behalf of the Yanomani Indians who alleged that the Brazilian government had violated their right to life by constructing a highway through their and by authorizing the exploitation of their territory resources and, therefore, the intrusion of outsiders carrying various contagious diseases into their territory. The Commission found that because the government permitted this intrusion without providing the essential medical care there was a breach of their right to life.[13]

The Human Rights Committee has also acknowledged that an invocation of the right to life under the Covenant is a means of protection from and a remedy for environmental abuses in a case involving the storage of nuclear waste. This raised serious issues with regard to the obligations of state parties to protect human life, although the case was declared inadmissible because of non-exhaustion of local remedies.[14]

Even the International Court of Justice has pronounced that: "the Court also recognises that the environment is not an abstraction but represents the living spade, the quality of life and the very health of human beings, including generation unborn".[15]

In fact, today, the European Court of Human Rights (the ECHR) is the only jurisdiction that still narrowly interprets the right to life. The ECHR approach is less flexible on this point. Even though the European judges have on several occasions recognised the link between human rights and environmental protection, [16] the judges have refused many times to appreciate the link between environmental destruction and violation of the right to life.[17] For example, in its 1996 *Lopez Ostra* decision, the Court stated that:

> Naturally, severe environmental pollution may affect an individual's well-being and prevent them from enjoying their homes in such a way

[13] Case 7615, *Yanoamami Indian Case* IACHR 24, OEA/Ser.L/V/11.66, doc. 10 rev.1 (1985).
[14] *Port Hope Environmental Group v. Canada*, Communication No.67/1980, (1982).
[15] *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)* [1996] ICJ Reports 226, at 29.
[16] *See* Desgagné, "Integrating Environmental Values into the European Convention on Human Rights" (1995) 89-2 *AJIL* 263.
[17] *Guerra and Others v. Italy*, 19 February 1998, App. No. 116/1996/753/923.

HeinOnline -- 6 Trinity C.L. Rev. 85 2003

> as to affect their private and family life adversely, without, however, seriously endangering their health.[18]

Thus, the Court acknowledged that environmental degradation may affect human rights such as right to family or private life but rejected the nexus between right to life and destruction of the environment.

The Notion of 'Potential Victims'

One of the difficulties for the human rights bodies is that some types of environmental degradation produce effects on human life only after many years. One of the characteristics of environmental harm is that it is contingent only, in the sense that there is only a probability that it will cause future harm. Thus the notion of 'potential victims' is central in environmental matters. Human rights bodies have highlighted that the duty to protect human life may lead to the obligation to prevent situations that might imperil human life. For example, in the *Velasquez Rodriguez* case, the IACHR stated that: "States must prevent, investigate and punish any violation of the rights recognized by the Convention".[19] The ECHR in the *Soering v. United Kingdom* case has also examined the notion of potential victim. The applicant was complaining that if he was extradited from England to the United States (to face trial in Virginia on a charge of a capital murder) he would face the risk of being sentenced to death and spending time on death row. The Court found a violation of the European Convention, as this extradition will "be contrary to Article 3 by reason of its foreseeable consequences".[20]

Thus, since human rights organs can perform an important preventive function there is a need to appreciate that human rights can protect human life against environmental hazards when the injury is foreseeable and life might be endangered. The question is to define if the right to life includes an obligation on states to prevent foreseeable harm to life including activities that might threaten life by environmental degradations.

The HRC dealt with the issue in 1996, when, following the French nuclear tests on Muruora and Fangataufa, the Committee received an application on the ground of a violation of the right to life because of foreseeable environmental damage.[21] The applicants claimed that the

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[18] *Lopez Ostra v. Spain* 9 December 1994, Series A 290, at para. 51.
[19] *Velasquez Rodriguez* case, Series C, no.4, Judgment of 29 July 1988.
[20] *Soering v. United Kingdom*, App. No. 11/1989/1611217, Judgment of the 7 July 1989, Series A No. 161, at 90.
[21] Human Rights Committee, *Bordes & Temeharo v. France*, 30 July 1996, Communication No. 645/1995: France 30/07/96, U.N. Doc. CCPR/C/57/D/645/1995.

HeinOnline -- 6 Trinity C.L. Rev. 86 2003

nuclear tests represented a threat to their right to life as one of the consequences of those tests was to indirectly threaten human life through the contamination of the food chain. In their communication the applicants highlighted the fact that the Committee has always affirmed that positives actions from states parties are necessary to protect the right to life, and, that in this case no specific measures had been taken. The applicants pointed out that notwithstanding the knowledge of the potential negative effects on the environment, the French government had instituted no evaluations of the effects of the test. [22] The French government submitted to the Committee that Article 6 of the ICCPR applies only in the event of a real and immediate threat to the right to life, which presents itself with some degree of certainty. As cancer and genetic deformities may take ten to thirty years to manifest themselves, the defendant government affirmed that the applicants' situation was a "purely hypothetical interference".[23]

At this stage it is important to highlight that the Committee in its General Comment 14(21) of 2 November 1984 has stated that the testing of nuclear weapons constitutes one of the most serious threats to the right to life. Nevertheless, in the present case, the Committee decided that the applicants could not be considered as victims as "he or she must show either that an act or omission of a State party has already adversely affected his or her enjoyment of such right, or that there is a real threat of such result".[24] Therefore, the case was found inadmissible under Article 1 of the Optional Protocol.

This case is evidence of the difficulty for the future victims of this specific kind of environmental degradation, as one of the saddest characteristics of nuclear pollution is the difficulty to evaluate its future consequences. This is one of the only HRC cases where these questions of potential victimhood in the context of environmental damage were raised. Thus, we could wonder what would be the time necessary for the risk to be considered as 'more than a theoretical possibility'.[25] Even though there is a large difference between a person facing the death penalty, and one facing a risk of cancer or leukaemia, the harm following an environmental degradation would appear to be irreversible as capital punishment.

This case serves to highlight the fact that: "the protection of potential or prospective victims is nowadays a real necessity and not a theoretical-

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[22] *See* Dallemagne *et al., Evaluation Mission: French Polynesia, Intermediary Report* (Médecins Sans Frontières, 1995).

[23] *Bordes & Temeharo v. France,* U.N. Doc. CCPR/C/57/D/645/1995, at para. 3.9.

[24] *Bordes & Temeharo v. France,* U.N. Doc. CCPR/C/57/D/645/1995, at para. 5.5.

[25] *Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius,* U.N. Doc. CCPR/C/OP/1,1981.

HeinOnline -- 6 Trinity C.L. Rev. 87 2003

academic speculation".[26] The right to life must be interpreted to include the duty of a state to protect potential victims from life-threatening environmental disasters that could occur following acts under its jurisdiction. In sum, the right to life should encompass the right of living,[27] this right entails negative as well positive obligations in favour of preservation of human life.

The notion of 'Ecocide' in International Law

Strictly defined, ecocide means the "[h]eedless or deliberate destruction of the natural environment, as by pollutants or an act of war".[28] Literally, this constitutes the environmental counterpart of genocide – a killing through the destruction of the environment. Taking a legal perspective, ecocide means:

> [A]dverse alterations, often irreparable, to the environment – for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest – which threaten the existence of entire populations.[29]

Therefore, the logic of ecocide is as follows: significantly harming the natural environment may lead to the extinction of specific groups. Even though there is no binding international instrument that refers to the term ecocide, the term can often be found in legal literature. Some academics have even drawn up a draft international convention on the crime of ecocide.[30] In a wider sense, the notion of ecocide can be linked to that of ethnocide, as these concepts involve the destruction of a whole group by affecting their conditions of livelihood. To answer the question of why he used the term 'genocide' to define the destruction of the environment by Shell and the Nigerian government, one of the leaders of Ogoni's struggle in Nigeria, Ken Saro-Wiwa, has stated:

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[26] Cançado Trindade, "The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change" in Weiss ed., *Environmental Change and International Law: New challenges and Dimensions* (United Nations University Press, 1992), at 244-271.

[27] *Ibid.*

[28] *The American Heritage Dictionary of the English Language* (4th ed., Houghton Mifflin Company, 2000).

[29] Whitaker, "Revised and Updated Report on the Question of the Prevention and the Punishment of the Crime of Genocide" UN Doc. E/CN.4/Sub.2/1985/6, 2 July 1985, at 17.

[30] *See* Westing, "Proscription of Ecocide" (1974) *Science and Public Affairs* 26.

HeinOnline -- 6 Trinity C.L. Rev. 88 2003

> If you take the Ogoni case for instance, you pollute their air, you pollute their streams, you make it for them to farm or to fish, which is their main resource of livelihood.... Now, more people in Ogoni are dying than are being born.... Ogoni people are going extinct.[31]

Environmental destruction can deny individuals, groups and communities the 'minimum quality of environment' needed to sustain both living standards and even life itself. As destruction may act to further political goals such as forced relocation, subjugation, assimilation, or internal colonialism.[32] In this regard, the creation of environmental insecurity may well reflect the governing body's discriminatory use of power. The UN Special Rapporteur, Nicomède Ruhashyankiko, has pointed out that:

> [A]ny interference with the natural surroundings or the environment in which ethnic groups lived was in effect a kind of ethnic genocide because such interference could prevent the people involved from following their own traditional way of life.[33]

The effects of environmental degradation are particularly harmful to the rights of vulnerable persons, groups and peoples. Deforestation, particularly of rain forests, and pollution may become sources of conflict between states and indigenous peoples. The UN Commission on Human Rights has highlighted that "[t]he sense of disintegration is compounded by destruction of the ecology and habitat upon which indigenous groups depend for their physical and cultural survival."[34] On this approach, there is a strong link between notions of ecocide and ethnocide as the most affected groups are often indigenous peoples. For indigenous peoples the land is a deep part of their existence because "they depend upon it for their physical and cultural survival".[35]

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[31] Saro-Wiwa, "We Will Defend Our Oil With Our Blood" in Abdul-Rasheed Na'allah ed., *Ogoni's Agonies: Ken Saro-Wiwa and the Crisis in Nigeria* (Africa World Press, 1998), at 351.

[32] *See* Weintraub, "Environmental Security, Environmental Management, and Environmental Justice" (1995) 12 *Pace EnvtlLRev* 533, at 546.

[33] UN Doc. E/CN.4/Sub.2/SR.658, at 53.

[34] Commission on Human Rights, "Report on the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States" UN Doc. E/CN.4/1989/22, at 27.

[35] *Ibid.*

HeinOnline -- 6 Trinity C.L. Rev. 89 2003

The UN Special Rapporteur José Martinez Cobo in his study has pointed out that "it is essential to understand the deeply spiritual relationship between indigenous peoples and their land as a basic to their existence as such".[36] In this regard, the Draft UN Declaration on the Rights of Indigenous Peoples would expand conventional definitions of genocide to protect indigenous peoples from 'ethnocide and cultural genocide'.[37]

The interest of such a criminal liability is especially based on the idea that mankind as a whole has an interest in the protection of the fragile environment in which most of the threats to life take place. Major environmental crises have highlighted the transnational nature of their impact. The protection of ecosystems in general is a question for every human, which is why the notion of the criminalisation of environmental destruction through concepts such as genocide or crimes against humanity is of importance. The newly created International Criminal Court (ICC) has jurisdiction on the 'most serious crimes of concern to the international community as a whole',[38] thus, the future Court "would seem negligent if it were to ignore these environmental crimes"[39] as those crimes put in danger the future of the international community.

Another reason is that in cases of environmental destruction that might lead to the destruction of human life – such destruction might implicate public institutions as well as private individuals. Environmental damages arising from human activities can seriously threaten human life and because such activities are undertaken or accepted by state officials, those persons should be held accountable under existing human rights law.

In most of the recent environmental cases that implicated human rights violations, private companies were involved in corruption and bribery. Thus, there would seem to be a significant degree of complicity between state authorities and private companies. [40] Transnational Corporations (TNCs) are private actors, but their activities are often authorized by, or are in cooperation with, governments. On this point the fact that the ICC has universal jurisdiction is of importance, as a vital legal question is to define if indigenous populations can claim against private

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[36] Quoted in Capotorti, "Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities" UN Doc. E/CN.4/Sub.2/384/Rev.1.

[37] Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth session, UN Doc. E/CN.4/1995/2 and E/CN.4/Sub.2/1994/56, Annex, Draft United Nations Declaration on the Rights of Indigenous Peoples, Article 7.

[38] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Article 5.

[39] Sharp, "Prospects for Environmental Liability in the International Criminal Court" (1999) 18 *Virginia Environmental Law Journal* 217, at 219.

[40] *See* United Nations High Commissioner for Human Rights, "Business and Human Rights: A progress Report" January 2000.

HeinOnline -- 6 Trinity C.L. Rev. 90 2003

individuals and companies.[41] Such protection will be relevant, as the past tendencies of TNCs were based on the request of governmental intervention to protect their investments, such complicity has lead to numerous human rights violations.

These notions of ecocide, ethnocide and cultural genocide are not recognized by any binding legal instrument, leaving open the issue as to whether those crimes could be enforced through the crime of genocide. Can the elimination of a group through the destruction of the environment constitute a crime of genocide under international law?

The Justiciability of 'Ecocide': Environmental Genocide or Environmental Crime Against Humanity?

Benjamin Whitaker has stated that "[e]very right can also only survive as a consequence of the exercise of responsibilities".[42] Thus it is crucial to appreciate whether the destruction of life stemming from the destruction of the environment is reprehensible under the definitions of the most important crimes punished by international criminal law.

Applicability of the Crime of Genocide

The crime of Genocide was defined fifty years ago in the Genocide Convention[43] and was not substantially questioned in the Rome Statute. There is a need to precisely define this crime as genocide is of special importance – genocide is, afterall, the 'crime of crimes'. Nevertheless, it is also of importance to realise that:

> [G]enocide is by no means a uniform phenomenon. There is no single theory of genocide. The crime is perpetrated in many different circumstances, affecting different target groups, and pursuing a different course.[44]

The definitions of genocide under Article 6 (c) of the ICC and under Article II of the Genocide Convention are certainly those which fit most

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[41] *See* Schabas, "Enforcing Humanitarian Law: Catching the Accomplices" Paper for Presentation to the Working Group on International Humanitarian Law, United States Institute of Peace, Washington, September 25, 2000.

[42] Whitaker, "Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide" UN Doc. E/CN.4/Sub.2/1985/6, 2 July 1985 at 5 para. 17.

[43] Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 1951.

[44] Kupper, "Genocide and Mass Killing: Illusion and Reality" in Ramcharan ed., *op. cit.*, at 114-119.

HeinOnline -- 6 Trinity C.L. Rev. 91 2003

comfortably with the concept of ecocide. These articles recognise that "deliberately inflicting conditions of life calculated to bring about physical destruction" is an act which constitutes genocide.

Even though Article 6 of the ICC has rejected the notion of 'cultural genocide', it recognises the fact that the destruction of the conditions of life of a group, in order to physically destroy it, is an act of genocide. The Finalized Draft Text of the Elements of Crimes states that "[t]he term 'conditions of life' may include, but are not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsions from homes".[45] This part of the draft text of the elements of crimes is crucial as in most of the cases that lead to the physical destruction of groups because of environmental degradation, those notions of access to food or systematic expulsions are the facts that give rise to the destruction of physical life.[46] For example, 25 % of the Brazilian Xingu Indians who were relocated died from diseases and homesickness, as their natural environment was part of their conditions of life.[47]

However the applicability of the crime of genocide in the case of environmental destruction is not evident. For example, following the NATO intervention in the Balkans, Yugoslavia has based some of its charges of genocide against several NATO countries on the fact that the continued bombing and the use of weapons containing uranium was a destruction of the environment that has lead to dilapidating living conditions. Before the International Court of Justice, the Yugoslav agent has argued that this use "implies the intent to destroy a national group as such in whole or in part."[48] However, as pointed out by Schabas; "[t]he most serious difficulty with the Yugoslav case on this point was establishing a genocidal intent".[49] The principal element of the crime demands that the acts have been committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[50] The Genocide Convention and the Rome Statute of the ICC require a

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[45] Report of the Preparatory Commission for the International criminal Court, 'Finalized Draft Text of the Elements of Crimes' PCNICC/2000/INF/3/Add.2, 6 July 2000, at 7.

[46] *See* Amnesty International and The Sierra Club, *Defending those who give the Earth a Voice* (2nd ed., January 2000). *See also* "Environmental Refugees", 12 Refuge 1, Canada's periodical on Refugees, York Lanes Press, 1992.

[47] Moody, *Indigenous Peoples, A global Quest for Justice* (Report for the Independent Commission on International Humanitarian Issues, 1987), at 85.

[48] *Legality of Use of Force (Yugoslavia v. Belgium et al.)*, Verbatim Record, 10 May 1999 (Rodoljub Etinski).

[49] Schabas, *Genocide in International Law* (Cambridge University Press, 2000).

[50] Rome Statute of the International Criminal Court, Article 6.

HeinOnline -- 6 Trinity C.L. Rev. 92 2003

'specific intent to destroy' a group or its members. This specific intent is very difficult to prove in cases implicating environmental destruction. For example, if there is evidence that oil exploration may have the effect of causing the extinction of a group, there is no clear indication that TNCs or States have a specific intent to extinguish such groups. Nevertheless, this does not mean that such 'specific intent' may never be found.

The situation in Brazil and Paraguay has shown the difficulty in proving the 'specific intent' to support a claim of genocide. Martin Geer in studying the situation of the Indians of Brazil has described the Brazilian model of development as a 'silent war' as this development was being waged against indigenous peoples.[51] In Paraguay, the Aché and other indigenous groups were the victims of acts of the government that were seeking to promote transnational corporations' oil exploration on ancestral lands.[52] Achés are now considered an extinct cultural group.[53] In these two examples it was not possible to prove the intent of the destruction even if notions of calculated and voluntary destruction were factually real, but governments argued that it was in the name of development. On this point, Peter Sharp has pointed out that; "[t]hough it is not difficult to imagine a TNC knowingly discharging pollutants into a water source which may displace, injure, sterilize, or even kill an indigenous population, the evidentiary hurdle of proving the specific intent to destroy the group as such is significant."[54] This author has also underlined the fact that it would be much more difficult by virtue of the fact that the right to development is recognized at the international level even if it is clear that that in most cases the development is not in the interests of the population but rather for foreign interests.

The Draft Declaration on the Rights of Indigenous Peoples uses the term "aim or effect" which is much more adaptable in cases of environmental destruction.[55] Most of the time, the perpetrator must be found to have acted with the knowledge that his act will cause a prohibited destruction of life. Nowadays, the consequences of environmental

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[51] Geer, "Foreigners in their Own Land: Cultural Land and Transnational Corporations: Emergent International Rights and Wrongs" (1998) 38 *Virginia Journal of International Law* 331.

[52] In 1983, the Sub-Commission appointed a Special Rapporteur on Genocide that widely studied the systematic massacre against Indigenous Aché of Paraguay.

[53] *See* Arens, ed., *Genocide in Paraguay* (Temple University Press, 1976).

[54] Sharp, "Prospects for Environmental Liability in the International Criminal Court" (1999) 18 *Virginia Environmental Law Journal* 217, at 221.

[55] Draft United Nations Declaration on the Rights of Indigenous Peoples, Article 7.

HeinOnline -- 6 Trinity C.L. Rev. 93 2003

destruction on specific groups such as indigenous peoples are well known and foreseeable, thus, 'presumably intent can be imputed'.[56]

In most of the cases arising from environmental destruction, there is now sufficient knowledge of available alternatives, but nevertheless, harmful policies continue to be followed. On this point the notion of 'negligent' genocide seems to be more appropriate. Benjamin Whitaker has used the term 'deliberately or with criminal negligence' when discussing ecocide[57] as a crime of negligence. Thus it becomes a crime "without genuine intent, but resulting from extreme carelessness". [58] This negligence-based definition will be much more adaptable to the crime of genocide by environmental destruction, as much of the time the aim of such a destruction is not the annihilation of a group but the result of 'extreme carelessness'. Nevertheless, if recognition of such a crime has been proposed, the central notion of the crime of genocide is the idea of 'malicious intent'. On this point, Schabas has highlighted that; "[e]xtending the scope of genocide to crimes of negligence can easily trivialize the entire concept".[59]

To conclude in looking at the possible applicability of genocide in case of ecocide, it is certain that if the environmental destruction can be associated with the intent to destroy then the definition of genocide may be applied.[60] Without the proof that the genocide was based on the specific intent of the destruction of the group as such, the crime of genocide could not be applicable. Genocide may be recognised if the proof that the destruction of the conditions of life was the principal mechanism used to destroy the group, rather than consequences of another aim such as money profit or pseudo developmental project.

'Environmental' Crime Against Humanity?

As discussed above, the crime of genocide is based on the idea that the offenders had killed with a 'specific intent', and this specific intent requires specific proof. Thus, the notion of crimes against humanity may be more appropriated to define a responsibility in environmental destruction as the notion of crimes against humanity "covers many of the same acts that would fall under the rubric of genocide, but without the high scientist element of demonstrating a specific intent to destroy".[61]

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[56] Kuper, *loc.cit* at 115.
[57] Benjamin Whitaker, *loc.cit.*
[58] Schabas, *op. cit.*
[59] *Ibid.*
[60] *Ibid.*, at 201.
[61] Sharp, *loc. cit.*, at 227.

HeinOnline -- 6 Trinity C.L. Rev. 94 2003

The crime against humanity also includes a 'mental element of the offence', as this crime is based on the idea of the destruction of a group. However, the intent of the offender is not a 'specific intent'. For example, in his report of 1986, Special Rapporteur Doudou Thiam discussed the distinction between genocide and inhuman acts, which are acts defined as crimes against humanity, "noting that genocide needed to be committed with the purpose of destroying a group, something that was not required in the case of inhuman acts".[62] In his volume on the crime against humanity, Cherif Bassiouni has highlighted the link between notions of knowledge and intent in the determination of the mental element of the crime:

> Crimes against humanity are *mala in se* acts, which are manifestly contrary to the norms, rules and principles of international criminal law ... for which most reasonable persons would not have consciousness of wrongdoing.[63]

The intent presupposes actual knowledge; therefore there is a link between the knowledge, which is a requirement of the crime against humanity, and the idea of intent. When the continuous and foreseeable results of oil extraction produces severe environmental degradation which destroys local populations, a policy which continues such extraction becomes an official policy which carries out attacks against a civilian population. Thus it "should be evident that when actions are taken in full knowledge of their direct results and the official policy is to continue said actions, the perpetuation of the results becomes inseparable from the official policy".[64] No government and no company can argue that they did not know the results of such destruction. In such cases the act will be committed 'with knowledge of the attack', all the more so because the Draft Text of Elements of Crimes states that "the last element should not be interpreted as requiring that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or Organization".[65] There are separate requirements that must be met in order to fulfil the definition of crime against humanity. Article 7 of the ICC refers to acts "committed as part of a widespread or systematic attack directed against any civilian population". For this requirement, the

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[62] Schabas, *op. cit.*, at 84.
[63] Bassiouni, *Crimes Against Humanity in International Criminal Law* (Martinus Nijhoff Publishers, 1992), at 365.
[64] Sharp, *loc. cit.*, at 223.
[65] Report of the Preparatory Commission for the International criminal Court, 'Finalized Draft Text of the Elements of Crimes' PCNICC/2000/INF/3/Add.2, 6 July 2000, at 9.

HeinOnline -- 6 Trinity C.L. Rev. 95 2003

continuous and knowing discharge of millions of gallons of toxic waste and oil onto the ancestral homelands of indigenous peoples, resulting in injury, displacement, or death to a significant number of the population, is certainly a 'widespread or systematic attack' in terms of time and volume. Relating to the criminal acts that may consist of a crime against humanity, the definition of the crime under the ICC statute refers to a different kind of criminal actions, and thus provides a greater range of proscribed actions. It seems that there are two defined actions by the ICC statute that provide for claims of environmental destruction. First, the crimes against humanity of deportation or forcible transfer of population[66] might be applicable because in many cases the destruction of the environment may have lead to the forcible transfer. For example, one of the consequences of the construction of China's Three Gorges Dam was the forcible relocation of more than one million people. By the same token, 25% of the Brazilian Xingu Indians who were relocated died from diseases and homesickness, as their natural environment was part of their conditions of life.[67] The use of the term 'forcibly' in the statute of the ICC is not confined to physical force; it includes 'taking advantage of a coercitive environment'.[68] Finally, Article 7(1)(b) of the ICC refers to acts of extermination. The Rome Statute explains that: "extermination includes the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population."[69] It is clear that such provision is potentially relevant to the cases of environmental destruction which have direct consequences on human life.

Conclusion

There are grounds for hope that in the future, this area of international law will grow strongly. Nevertheless, examination of the current link between the right to life and destruction of the environment highlights the lack of human-rights protection, particularly with regard to the criminality of environmental degradation. In theory it is rather clear that a criminal prosecution might be possible. However in practice it would be very difficult. This paper has tried to evaluate the potential of the ICC to address

[66] Rome Statute of the International Criminal Court, Article 7(1)(d).
[67] Moody, *op. cit.*, at 194.
[68] Report of the Preparatory Commission for the International criminal Court, 'Finalized Draft Text of the Elements of Crimes' PCNICC/2000/INF/3/Add.2, 6 July 2000, at 11, fn. 12.
[69] Rome Statute of the International Criminal Court Article 7 (1) (b), para. 2.

HeinOnline -- 6 Trinity C.L. Rev. 96 2003

the issue of grave environmental wrongs; those that cause the injury or death of either individuals or population. With regard to the applicability of the crime of genocide and crimes against humanity, the problem ultimately is one of proof rather than one of 'justiciability'. This court has the mandate to deal with 'the most serious crimes of international concern', in this regard it could be affirmed that this court might be able to prosecute acts of genocide, crime against humanity, and war crimes, which are carried out through environmental means. However, even though there are more and more international human rights documents dealing with the environment, there have been very few cases brought to enforce this new link. As stated above, the question of the protection of the environment is a political one as there is a requirement to select the policy as worth following. However it is certain that international human rights law will have to intervene more and more in the very political "battle between on the one side, many ecologists who see the world as a closed system with increasingly limited resources and, on the other, neoclassical economist who express powerful faith in the capacity of incentives and technological growth to extend those limits".[70]

When life is endangered because of abuses of governments and their acolytes, human rights must be more efficient to give a minimum protection to these populations which are going to disappear in the near future because of destruction of their natural environment. In this regard environmental protection is not only a political or scientific issue but must be also regarded as an issue of justice. Legal courts must remain concerned when fundamental rights are in danger. For that purpose the position of the courts have evolved in response to changing social conditions, and account has been taken of the increasing importance of environmental protection. The difficulty of course is that the nexus between environmental degradation and criminal liability remains theoretical.

[70] Kennedy, *Environmental Quality and Regional Conflict* Report to the Carnegie Commission on Preventing Deadly Conflict, December 1998, Carnegie Corporation of New York, at 5.

HeinOnline -- 6 Trinity C.L. Rev. 97 2003